Supreme Court, U.S.
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No. 951953

In The

Supreme Court of the United States

October Term, 1995

RICHARD L. BURNS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In deciding a motion to dismiss a criminal indictment based on a negligent eight year pre-indictment delay by the government, may the district court "presume" the existence of prejudice, based on the totality of circumstances, in reliance on *Doggett v. United States*, 505 U.S. 647 (1992)?

2. What is the appellate standard of review for cases involving pre-indictment delay?

3. May the Ninth Circuit reverse a finding of a district court dismissing several counts of an indictment where the Ninth Circuit had no appellate jurisdiction because the government failed to "diligently prosecute" such appeal (as expressly required by 18 U.S.C. § 3731)?

PARTIES TO THE PROCEEDING

This petition for a writ of certiorari is brought by Richard Burns. David Watt, Joyce C. Burns and Rocco Fabiano, parties to the proceeding in the court below, are not joining in this petition for a writ of certiorari.

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Petitioner Richard L. Burns ("Burns") respectfully prays that a writ of certiorari issue to review the decision of the Ninth Circuit, dated March 8, 1996, which appears in the Appendix at 3a (hereafter "Decision").

The Decision reversed the trial court's dismissal of 13 counts of a 31 count indictment.[1] In dismissing 13 counts of the indictment, the district court issued 56 pages of written findings of fact and conclusions of law, finding *inter alia*, that: (1) the government's eight year delay in bringing the instant indictment was negligent; (2) this negligence caused "overwhelming prejudice" to the defendants; and (3) even if there had not been any showing of actual prejudice, under this Court's decision in *Doggett v. United States*, 505 U.S. 647 (1992), "presumptive prejudice" exists (hereafter "*Doggett*").

The district court's finding of government negligence was not disturbed by the Ninth Circuit in the Decision. The district court had found that the government initiated FBI and grand jury investigations of the precise matters subject to the indictment in 1987 and 1988 in the Central District of California. These investigations were the result of formal complaints by the Federal Deposit Insurance Corporation ("FDIC") in 1986 and 1987. The government *declined prosecution* as a result of those investigations, and the matter was "dead." The government then renewed the *same* investigation in the Southern District of California in 1991, almost five years after the initial FDIC complaint, but still did not obtain an indictment until December 1993 — about eight years after the initial complaint by the FDIC.

The district court identified substantial evidence of negligence by the government in connection with the eight year

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1. Most remaining counts were tried before a jury in July and August 1995, resulting in the acquittal of all defendants on all counts tried.

delay. The Ninth Circuit said nothing to set aside or question this finding of government negligence, and such negligence is therefore conclusively presumed for the purposes of the instant petition.

The district court also found "overwhelming" actual prejudice caused by the delay. The gravamen of the indictment was that the defendants had caused a federally insured bank to make unsafe loans. However, during the lengthy period of delay, the government lost and spoliated *over 90% of the allegedly unsafe loan files*. Thus, defendants were charged with causing a bank to grant unsafe loans, but the files of these allegedly unsafe loans were not retained by the government. Further, the lead federal and state regulators responsible for supervising the allegedly unsafe loans both died, as did the accountant who handled all of the relevant money allegedly derived from the supposed scheme.

The Ninth Circuit reversed the district court, finding that defendants had not adequately shown the unavailability of "alternative" methods to prove the evidence lost as a result of the long delay.[2]

Significantly, after finding "overwhelming prejudice," the district court also found, as an alternative, that defendants did not need to demonstrate actual prejudice because of the ruling of this Court in *Doggett*. *Doggett* held that actual prejudice could be "presumed" from an eight year delay. However, in *Doggett*, the delay had been post-indictment; in this case, it was pre-indictment.

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2. The Ninth Circuit suggested that further hearings in the district court would be needed to determine whether defendants had an "alternative" way to prove the exculpatory evidence lost because of the government's delay. Such hearings have not yet been scheduled.

The Ninth Circuit ruled that *Doggett* is inapplicable to pre-indictment delay, and that *Doggett* applies only to delay occurring after an indictment is returned.

In *Doggett*, this Court did not address the question of whether its ruling applied to pre-indictment delay. This Court did specifically rule, however, that "presumptive prejudice" arises from long delay because such delay "compromises the reliability of a trial." *Id.* at 655-656. Presumably a trial with "compromise[d] reliability" is unacceptable whether the delay occurs before or after indictment.

As shown in detail below, there are compelling reasons why *Doggett* should inherently be applied to pre-indictment delay. As stated by Justice Thomas in his *Doggett* dissent: "A defendant prosecuted 10 years after a crime is just as hampered in his ability to defend himself whether he was indicted the week after the crime or the week before trial. . . ." *Id.* at 663 (Thomas, J. dissent). Further, the government's growing trend of reaching far into the past in banking and financial cases — often long after records are destroyed and witnesses are dead — is highly unfair and has created a major burden on the judicial system. It is no longer uncommon for bankers and businesspeople to face decade old charges involving long-past financial transactions and events that no citizen could possibly recall.

Further, in the instant case, the Ninth Circuit lacked jurisdiction over the government's appeal. Burns' brief to the Ninth Circuit argued in the section on appellate jurisdiction that such jurisdiction did not exist. The statute, 18 U.S.C. § 3731, provides appellate jurisdiction over an interlocutory government appeal of a dismissal of some (but not all) counts of an indictment *only* if the government "diligently prosecutes" the appeal. Here, the government did not diligently prosecute the appeal and the Ninth Circuit did not require it to do so. After the

appeal was docketed, the Ninth Circuit entered an order inquiring about whether the appeal should be expedited. This order required the government to file a brief on this issue. The government ignored this order, failed to file any brief and as result, the appeal was *not* expedited.

The purpose of section 3731 is to resolve any interlocutory government appeals promptly so that all related counts can then be tried together before the same jury. In this case, the government apparently made a strategic decision to proceed to trial on the counts of the indictment that were not dismissed without diligently pursuing the appeal.

Moreover, in the instant case, Burns objected to the government's interlocutory appeal and to expedited handling of that appeal. The government obtained a trial date for the remaining counts at a time before the appeal could possibly be heard. Further, had the appeal been expedited, Burns' counsel would have been required to prepare extensive appellate briefing *during* the trial of the remaining counts. Moreover, during this same time, different parts of "the government" (*i.e.*, the U.S. Attorney and the FDIC) were threatening defendants with essentially simultaneous civil and criminal trials of the parallel cases in different districts.

In this context, a panel of the Ninth Circuit issued an order requiring the government to explain whether the instant appeal should be expedited. Rather than respond to this order, the government elected to proceed to trial on the remaining counts which had not been dismissed. After the defendants were acquitted, the government sought a "second bite of the apple" on the dismissed counts. By then, a *different panel* had been assigned by the Ninth Circuit and the government's appeal was entertained even though the government ignored the prior order of the court.

Notwithstanding these inconsistencies by the Ninth Circuit, the failure to pursue expedited handling of the appeal deprived the Ninth Circuit of appellate jurisdiction. *The Ninth Circuit did not even make a finding on the existence of its own jurisdiction.* This petition therefore raises significant issues of the scope of appellate jurisdiction under 18 U.S.C. § 3731.

OPINIONS BELOW

The opinion of the Ninth Circuit appears in the Appendix at 3a. The opinion of the United States District Court for the Southern District of California appears in the Appendix at 36a. The opinion of the United States District Court for the Southern District of California denying reconsideration appears in the Appendix at 12a. The order of the Ninth Circuit denying the petition for rehearing appears in the Appendix at 1a. All are unreported memorandum decisions.

STATEMENT OF JURISDICTION

The decision of the Ninth Circuit was entered on March 8, 1996. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on April 23, 1996. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The instant petition involves constitutional issues arising under the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States. This petition also involves the interpretation of 18 U.S.C. § 3731 regarding the scope of appellate jurisdiction over government appeals.

STATEMENT OF THE CASE

On November 5, 1993, Burns, his wife, and two other defendants, were indicted by a federal grand jury in the Southern District of California. (C.R. 1; 1 E.R. at 1.) Four previous grand juries used by the government had *not* returned an indictment. (C.R. 48 at 10-11, C.R. 48 [Ex. K]; 1 S.E.R. at 70-76; 1 E.R. at 59-60.) The indictment, arising out of the failure of the Tustin-based Far Western Bank ("the Bank"), contained thirty-one counts of conspiracy, bank fraud, bank bribery, money laundering and false statements on tax returns. (C.R. 1; 1 E.R. at 1.) Burns and his wife invested and lost $8 million, their life savings, in connection with the failure of the Bank. (C.R. 138 [Ex. CCC], C.R. 138 at 4; 2 S.E.R. at 378-404; 3 E.R. at 650.) The Bank was closed when a new FDIC examiner changed accounting systems and declared the Bank insolvent even though two "Big Eight" accounting firms had found it to be highly profitable.

On July 11, 1994, Burns moved to dismiss the indictment for unfair pre-indictment delay. (C.R. 46-48.) On September 6, 1995, the district court entered an order dismissing counts 1-2, 18-26, 29, and 30 of the indictment. (C.R. 116; 2 E.R. at 348.) On October 4, 1994, the government filed a motion for reconsideration. (C.R. 119; 2 E.R. at 380.) That motion was denied on January 6, 1995, except that count 30 was reinstated. (C.R. 143; 3 E.R. at 708-731.)

The district court found "overwhelming prejudice" from the delay, and balanced that prejudice against a factual finding of actual government negligence in delaying the filing of these charges. After three hearings, review of hundreds of exhibits, and testimony transcripts from over twenty witnesses, the district court issued 56 pages of findings in connection with the motion. (C.R. 116, 143; 2 E.R. at 348-379, 3 E.R. at 708-731.)

The court found actual prejudice because of three dead exculpatory witnesses; massive missing records that were exculpatory; and literally hundreds of examples of witnesses who could not recall material information. *Id.* To this day, all of Burns' assets remain "frozen" by the government based on conduct that occurred in 1986. (C.R. 106 [Ex. II]; 1 S.E.R. at 181.) The investigation has had legal repercussions since 1988 or earlier. (C.R. 106 [Ex. JJ]; 1 S.E.R. at 185.) It has also resulted in exposure of Burns to adverse publicity dating back to 1988. (C.R. 106 [Ex. KK]; 1 S.E.R. at 187.)

In addition to the specific evidence of actual prejudice, there was also unrebutted evidence that (1) the government deliberately used the delay to its advantage (C.R. 138 [Ex. AAA at 194-195, 248-249, 280, 289, 308]; 2 S.E.R. at 350-51, 369-71, 375-76), and (2) a significant part of the delay was apparently to induce additional investments by Burns in the Bank (C.R. 138 [Ex. CCC], C.R. 138 at 4; 2 S.E.R. at 378-404; 3 E.R. at 650). The Ninth Circuit failed to address or even mention this evidence.

The government argued that the delay was not negligent because the investigation was "complex." However, the government did not introduce any evidence concerning the reasons for the delay. In fact, the government refused to do so. (R.T. [6/28/94] at 16-18; 1 S.E.R. at 2426.) The only evidence of the reason for the delay is that the case was initially "declined" after a long investigation; there was a two year gap before it was revived; and once revived, it was repeatedly transferred between prosecutors and agents and grand juries for several more years.

The Ninth Circuit did not disturb the district court's finding that the government's delay was excessive and negligent. Thus, this finding is "law of the case" and may not be disputed for the purposes of this petition. The Ninth Circuit's ruling was based

solely on a determination that defendants had not shown the absence of alternative ways to prove the exculpatory evidence lost as a result of the delay.

REASONS FOR GRANTING THE WRIT

I.

THE EIGHT-YEAR DELAY WAS "PRESUMPTIVELY PREJUDICIAL" UNDER *DOGGETT*.

In *Doggett*, this Court held that a period of eight and one-half years between an indictment and arrest violated the defendant's right to a speedy trial even if defendant could not show actual prejudice. This Court held that:

> [I]mpairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony "can rarely be shown" .... Thus, we generally have to recognize that excessive delay presumptively *compromises the reliability of a trial* in ways that neither party can prove or, for that matter, identify.

Id. at 655 (emphasis added, citations omitted). The Court added:

> The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it.

Id. at 657. The Court also stated that unreasonable delay "threatens to produce more than one sort of harm, including . . . 'anxiety and concern of the accused,' and 'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence." *Id.* at 654 (*quoting Barker v. Wingo*, 407 U.S. 514 (1972)). Significantly, this Court emphasized in *Doggett* that: "Of these forms of prejudice, 'the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.' " *Id.* (*quoting Barker v. Wingo*, 407 U.S. 514 (1972)).

In *Doggett*, this Court did not specifically address the applicability of its decision to pre-indictment delay. As shown below, since *Doggett*, some courts have held that its analysis is applicable to pre-indictment delay and some have held that it is not applicable. The majority have decided that *Doggett* is not applicable to pre-indictment delay. However, the basic rationale for *all* cases rejecting the applicability of *Doggett* to pre-indictment delay is simply that pre-indictment delay is governed by the Fifth Amendment whereas post-indictment delay is governed by the Sixth Amendment. As shown below, this reasoning clouds the doctrinal underpinnings of several rulings of this Court as well as the policies underlying those rulings.

From a policy standpoint, the principle of *Doggett* should apply *more strongly* to pre-indictment delay than to post-indictment delay. After indictment, the defendant has notice of the charges. The defendant is entitled to counsel, and can investigate, interview witnesses, seek discovery and generally act to reduce the impact of the delay. Before indictment, the delay is far more pernicious. There is no ability to prepare for unknown or speculative charges. There is no chance or motivation to preserve evidence or to minimize the impact of the delay. *See United States v. Benjamin*, 816 F. Supp. 373, 378-81 (D.V.I. 1993). There is not even a right to counsel.

Further, the decisions rejecting the applicability of *Doggett* to pre-indictment delay reflect fuzzy constitutional thinking. It is true that the Sixth Amendment protects *some* interests that are unique to post-indictment delay, *i.e.*, the right to bail. However, *all* constitutional cases uniformly agree that under both the Fifth Amendment and the Sixth Amendment, an important *overlapping interest* is the right to a trial that is not unreasonably delayed. In *Barker v. Wingo*, 407 U.S. 514 (1972), this Court stated that of all the policies fostered by the Speedy Trial Clause, the "most serious" was to prevent impairment of the ability to defend a criminal case. *Id.* at 532. This Court stated that "the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* This Court added:

> If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past . . . however, . . . what has been forgotten can rarely be shown.

Id. As shown above, this Court added in *Doggett* that such delay "compromises the reliability of a trial." *Doggett*, 505 U.S. at 655.

The Speedy Trial Clause is part of the Sixth Amendment, along with the right to counsel, the right to a jury, the right to confront witnesses, and other important rights. Even though the Sixth Amendment by its terms would only apply to federal courts, this Court has uniformly "imported" these rights to the states through the due process clause of the Fourteenth Amendment. This is confirmed in the very first paragraph of *Barker*, 407 U.S. at 515.

The fundamental recognition that Sixth Amendment rights

can also be due process rights is critical to the analysis of *Doggett*. When *Doggett* found that unfair delay "compromises the reliability of a trial," that decision was a matter of due process which inherently should apply to the states and, *a fortiori*, to pre-indictment delay under both the Fifth and Fourteenth Amendments. Whether delay is before or after indictment, a dead witness or a lost document "compromises the reliability of a trial" in *exactly* the same way. The government cannot seriously argue that a trial with "compromise[d] reliability" should be tolerated merely because the delay was before, rather than after, indictment. *See United States v. Marion*, 404 U.S. 307, 331 (1971) (before indictment, a suspect is at a special disadvantage, for "the State may proceed methodically to build its case while the prospective defendant proceeds to lose his.") (Douglas, J., concurring).[3]

The Ninth Circuit has arguably been inconsistent on this issue. In *United States v. Mohawk*, 20 F.3d 1480 (9th Cir. 1994), the defendant argued that his indictment should be dismissed because of delay in processing his appeal. *Id.* at 1485. Initially, the Ninth Circuit applied the traditional test for evaluating claims of appellate delay which, like the traditional analysis for pre-indictment delay, required a showing of actual trial prejudice. *Id.* Because the delay was at the appeal level and the trial had already occurred, the defendant was not able to show actual trial prejudice. *Id.* at 1487. The witnesses had already testified, had been cross-examined, and their testimony was preserved in admissible form.

After concluding that there had been no actual prejudice from the appellate delay, the Ninth Circuit in *Mohawk* turned to

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3. In a panel that included Justice Breyer, the First Circuit suggested that the effect of pre-indictment delay can be an important part of the *Barker v. Wingo* analysis. *United States v. Henson*, 945 F.2d 430, 437-38 (1st Cir. 1991).

the issue of whether *Doggett* should be applied to appellate delay. *Id.* The court concluded that *Doggett* is inapplicable to appellate delay because the appellate record is completely *written* and is not changed, harmed or affected by delay. The Ninth Circuit stated that *Doggett* should, therefore, apply only in the "pre-trial delay context." *Id.* at 1488. The Ninth Circuit did not distinguish between pre- and post-indictment delay, referring only to "pre-trial delay." Thus, *Mohawk* distinctly suggests by its reasoning that *Doggett* is applicable to pre-indictment delay.

However, in *Bischel v. United States*, 61 F.3d 1429, 1436 (9th Cir. 1995), the Ninth Circuit, in a passing reference, found that *Doggett* does not apply to pre-indictment delay. This was a conclusory decision without substantive constitutional analysis. The Ninth Circuit's decisions in the instant case and in *Bischel* are at odds with *Doggett* and *Mohawk*, referenced above.

In the court below, the government relied on two Fifth Circuit cases, *United States v. Byrd*, 31 F.3d 1329 (5th Cir. 1994) and *United States v. Beszborn*, 21 F.3d 62 (5th Cir. 1994). These decisions, however, contain absolutely no analysis of the *reasons* for or against application of *Doggett* to pre-indictment delay. Rather, they state without analysis that *Doggett* does not apply because *Doggett* was a post-indictment delay case.[4]

There are important policy reasons and judicial administration reasons for the application of *Doggett* to pre-indictment delay. Currently, the government reacts swiftly and decisively — preserving evidence and bringing charges — in

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4. Similarly, *United States v. Anagnostou*, 974 F.2d 939, 942 n.1 (7th Cir. 1992), assumed without analysis that *Doggett* does not apply. ("Neither party has suggested that the Court's holding in *Doggett* might have some ramifications in the pre-indictment delay context. . . .")

cases involving such things as drugs and violent crime. But when the government suspects wrongdoing by bankers and businesspeople, the case often languishes for years. Ten-year-old bank and securities cases (posing absurd memory-test questions to the witnesses) have become the rule rather than the exception. Judicial districts in metropolitan areas are heavily burdened by parallel civil and criminal prosecutions for bank failures and alleged securities frauds occurring well over ten years ago. The government's aggressive circumvention of the statutes of limitation (by the creative use of "conspiracy" counts) has created a situation where district courts must struggle to manage huge white collar cases with missing records and no realistic hope that honest witnesses will have a meaningful memory of relevant transactional details.

The government generally argues that these growing periods of delay relate to the "complexity" of such prosecutions. This argument is fallacious. No amount of supposed complexity requires an eight year delay. No amount of supposed complexity justifies a six year delay before relevant records are even subpoenaed or reviewed. The long delays in white collar cases stem not from complexity but from government resource allocations and shifting prosecutive policies in different administrations.[5] While such different prosecutive agendas may be appropriate and even desirable, this does not justify the huge burden on the courts, on defendants, and on the public caused by the growing pattern of massive governmental delays of such prosecutions — delays that to a moral certainty "compromise the reliability of the trial."

The government usually argues that Congress has addressed

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5. With increasingly expansive and creative definitions of the word "fraud," conduct viewed as "entrepreneurial" under one administration is often branded as felonious under another.

and resolved such policy differences by the creation of statutes of limitation. This argument was expressly rejected by this Court in *United States v. Marion*, 404 U.S. 307, 324 (1971).

Moreover, given the contemporary use and interpretation of statutes of limitation in criminal cases, the government's argument lacks merit. For example, the government almost always argues that the statute of limitations runs from the "last overt act" in a conspiracy. The government routinely selects as "overt acts" events occurring long after the underlying crime (such as "efforts to prevent detection of the conspiracy"). Moreover, Congress has retroactively extended the statute of limitations in bank cases to ten years. *See* 18 U.S.C. § 3293.[6] Thus, contemporary use and application of statutes of limitation often result in indictments for events occurring well over a decade before the date of indictment. This exceeds the known capacity of the human memory and violates the due process ability of a defendant to defend himself.

Witnesses cannot meaningfully testify about the meaning and intent of complex transactional documents executed over a decade ago. A well known pattern has emerged from this problem: *the only witnesses in many of these cases with a clear purported "memory" of relevant events are those witnesses given deals and plea bargains by the government.* Even in the light most charitable to the government, such "memories" are prompted by a desire to stay out of jail.

These are fundamental due process problems which would

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6. In the instant case, the statute of limitations on many of the offenses charged was about to expire when, on November 29, 1990, the statute was extended by Congress. The ten-year statute of limitations may serve a legitimate function for undetected financial crimes, but does not override the due process clause — particularly for allegations known and investigated for a full eight years as in this case.

be solved in substantial part by the application of *Doggett* to pre-indictment delay. The applicability of *Doggett* would prompt the government to recognize that it must not permit its prosecutors and agencies to delay cases at their whim for eight, ten or twelve years while documents are lost and memories fade, and then expect citizens called as trial witnesses to explain what happened many years earlier.

The applicability of *Doggett* to pre-indictment delay is an issue of exceptional importance and controversy. This issue warrants review by this Court.

II.

THE DECISION USED THE WRONG STANDARD OF REVIEW.

The Ninth Circuit found that the district judge's finding of prejudice was "clearly erroneous." However, the Ninth Circuit should have applied the "abuse of discretion" standard to the district court's denial of the government's motion for reconsideration. *United States v. Nutri-Cology, Inc.*, 982 F.2d 394, 397 (9th Cir. 1992); *Floyd v. Laws*, 929 F.2d 1390, 1400 (9th Cir. 1991).

Under the abuse of discretion standard, a reviewing court cannot substitute its judgment for that of the district court. *Hunt v. National Broadcasting Co.*, 872 F.2d 289, 292 (9th Cir. 1989). The decision made no finding that the district court abused its discretion.

The proper "standard of review" is a matter of exceptional importance warranting review. *Existing cases are unclear about the distinction between the "clearly erroneous" standard and the "abuse of discretion" standard. This confusion should be clarified so that the courts of appeal apply a uniform standard of review.*

III.

THERE WAS NO APPELLATE JURISDICTION.

Burns noted in his brief to the Ninth Circuit that the court did not have appellate jurisdiction over the government's appeal under 18 U.S.C. § 3731.

The Ninth Circuit's decision did not make any finding on the existence of appellate jurisdiction.

The government waived appellate jurisdiction by *ignoring* an order of the Ninth Circuit to file a brief on the issue of expedited consideration of the appeal and by failing to "diligently" pursue the appeal, as required by 18 U.S.C. § 3731. Defendants, including Burns, had opposed expedited processing of the appeal and the existence of appellate jurisdiction. They argued the government was manipulating the parallel civil and criminal cases — parallel cases filed by the government in two different districts — to "squeeze" the defense by seeking a civil trial at a time that would most interfere with preparation for the criminal trial and the appeal to the Ninth Circuit.

More importantly, the government made a decision to proceed to trial on *non-severed counts* of the indictment in this case without "diligently" pursuing the appeal on the dismissed counts, as required by 18 U.S.C. § 3731. Thus, there was no appellate jurisdiction in the Ninth Circuit.

It is a matter of exceptional importance to require that appellate courts not issue decisions in the absence of appellate jurisdiction. It is also important to prevent the government from manipulating appellate jurisdiction in order to secure multiple trials against the same defendant on related claims. This issue merits review.

CONCLUSION

For the foregoing reasons, Burns requests that this Court grant the instant petition for a writ of certiorari on the foregoing issues.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 23, 1996

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-50055
D.C. No. 93-1446-R

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

RICHARD BURNS (1), DAVID WATT (2), and JOYCE C. BURNS (3),

Defendants-Appellees.

ORDER

Before: POOLE, O'SCANNLAIN, Circuit Judges, and MARSH, District Judge.**

The panel has voted to deny Appellee's petition for rehearing. Judge O'Scannlain has voted to reject the suggestion for rehearing en banc. Judges Poole and Marsh so recommend.

** The Honorable Malcolm F. Marsh, United States District Judge for the District of Oregon, sitting by designation.

Appendix A

The full court has been advised of the suggestion for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX B — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MARCH 8, 1996

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-50055
D.C. No. CR-93-1446-R

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

RICHARD BURNS (1), DAVID WATT (2), and JOYCE C. BURNS (3),

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of California
John S. Rhoades, District Judge, Presiding

Argued and Submitted October 20, 1995
Pasadena California

Appendix B

MEMORANDUM*

Before: POOLE, O'SCANNLAIN, Circuit Judges, and MARSH, District Judge.**

The United States appeals the district court's dismissal of the indictment against Richard Burns, Joyce Burns, and David Watt ("defendants"). The district court found that the eight-year preindictment delay in this case violated due process. We REVERSE.

On November 5, 1993, defendants and Rocco Fabiano were indicted on 31 counts including conspiracy, bank fraud, bank bribery, money laundering and false statements on tax returns. The charges all relate to the defendants' involvement in the operation of Far Western Bank. Mr. Fabiano was not charged in any of the dismissed counts.

Defendants were shareholders of Far Western. Joyce Burns and David Watt served on the board of directors. Defendants allegedly enacted a business plan in 1986 to make high risk automobile loans to individuals with poor credit histories. The defendants also entered a limited partnership, RSIA, Limited, with Roger Steele, sole owner of RSIA, Inc. Defendants and Roger Steele agreed that RSIA, Inc. would provide insurance and service contracts for automobiles financed by the bank. RSIA, Inc.'s distributable income was divided among the RSIA,

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Malcolm F. Marsh, United States District Judge for the District of Oregon, sitting by designation.

Limited partners. The defendants allegedly deceived bank regulators about their control and financial interests in RSIA, Inc. and other entities that benefited from the bank's lending activities.

The FDIC and California State Banking Department ("CSBD") conducted a joint examination of the bank in Fall, 1987. During the investigation, the regulators became concerned about the poor quality and large quantity of automobile loans. The regulators also began to uncover the connection between the bank's lending practices and the commission income being generated by RSIA, Inc. In February 1988, the FDIC made a criminal referral to the FBI in Los Angeles. The investigation was closed in January 1989, and no charges were filed.

In December 1989, a grand jury began investigating Imperial Bank. In December 1990, the investigation began to focus on the relationship between Imperial and Far Western. Imperial had purchased numerous automobile loans from Far Western. The grand jury returned an indictment against the defendants on November 5, 1993.

Defendants moved to dismiss the indictment due to, among other issues, preindictment delay. On September 6, 1994, the district court dismissed Counts 1, 2, 18-26, 29 and 30. The government filed a motion to reconsider. On January 6, 1995, the district court issued a written order denying the motion to reconsider, except for the reinstatement of Count 30.

The government contends that the district court erred by finding that the defendants (1) were entitled to a presumption of prejudice from the preindictment delay and (2) suffered actual prejudice. The government also contends that the district court

erroneously found that the preindictment delay violated due process.

We review a district court's decision to dismiss an indictment for preindictment delay for abuse of discretion. *United States v. Huntley*, 976 F.2d 1287, 1289 (9th Cir. 1992). A finding of prejudice is reviewed under the clearly erroneous standard, but this court "must keep the defendant's heavy burden in mind." *Id.*

Preindictment delay violates due process only if the defendant proves (1) actual, nonspeculative prejudice from the delay, and (2) the length of the delay, when balanced against the reason for it, offends fundamental conceptions of justice. *United States v. Dudden*, 65 F.3d 1461, 1466 (9th Cir. 1995).

The district court erred by finding presumptive prejudice under *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686 (1992). In *Doggett*, the Supreme Court held a defendant's Sixth Amendment rights had been violated by an 8 1/2 year postindictment delay after ruling that the defendant was entitled to a presumption of prejudice from the delay. *Doggett*, however, is inapplicable to Fifth Amendment preindictment cases. *United States v. Bischel*, 61 F.3d 1429, 1436 (9th Cir. 1995) (requiring defendant to prove actual prejudice from preindictment delay).

The district court found that even if *Doggett* does not authorize a finding of presumptive prejudice, the indictments should still be dismissed because the defendants showed actual prejudice as a result of the government's delay. The district court found that the defendants suffered actual prejudice from the death of two witnesses, the faded memories of other witness, and the loss of various loan files.

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"In demonstrating actual prejudice, the defendant's burden is a heavy one: the proof must be definite and not speculative, and the defendant must demonstrate how the loss of a witness and/or evidence is prejudicial to his case." *United States v. Talbot*, 51 F.3d 183, 185 (9th Cir. 1995). The mere assertion that a missing witness might have been useful does not establish actual prejudice. *United States v. Mays*, 549 F.2d 670, 677 (9th Cir. 1977). The defendant must also show that the missing evidence is not available from other sources. *United States v. Horowitz*, 756 F.2d 1400, 1405 (9th Cir.), *cert. denied*, 474 U.S. 822 (1985).

The Fifth Amendment due process clause plays a limited role in protecting against oppressive delay. *United States v. Pallan*, 571 F.2d 497, 499 (9th Cir. 1978). Protection against prejudice from lost testimony, like lost documents and faded memories, generally falls solely within the ambit of the statute of limitations. *Id.* at 500. This court has questioned whether such loss could ever constitute actual prejudice. *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986).

The defendants contend that they suffered prejudice from the preindictment delay because two witnesses died. The first decedent witness, John Sexton, the Regional Director of the FDIC, participated in the FDIC investigation of Far Western. The defendants contend that a letter from Mr. Sexton illustrates his knowledge and approval of the insurance commissions received by the defendants.

The district court found that defendants suffered actual, nonspeculative prejudice from the loss of this witness because he could have provided exculpatory evidence. The court also found that Mr. Sexton, as the author of the letter and the regional

director of the FDIC, was in a more knowledgeable position than other FDIC regulators. Finally, the district court found that other regulators have no recollection of key events.

Again, defendants did not show that no alternatives were available. *See Horowitz*, 756 F.2d at 1405. The letter itself may be admissible. The district court did not consider that Sexton was not the regional director of the FDIC until August, 1989. It seems implausible that he would have unique knowledge of a business plan established three years earlier. Also, the district court found that Mr. Sexton *could* provide exculpatory evidence as to the FDIC's knowledge of RSIA, Limited partnership. However, the letter says nothing of the numerous other allegations of fraud included within counts 1 and 2. Thus, at best, it is only partially exculpatory and speculative. Such speculation is insufficient. *Mays*, 549 F.2d at 677.

The second deceased witness is Al Neubauer, one of the defendants' accountants. In his testimony before the grand jury, Mr. Neubauer stated that he believed it would have been illegal for the insurance commissions to flow back to Far Western instead of RSIA, Limited, as the regulators wanted. The district court found, therefore, that Mr. Neubauer would have helped the defendants.

The district court again did not consider whether this evidence was available from other sources. *See Horowitz*, 756 F.2d at 1405. For instance, Mr. Neubauer's grand jury testimony may be admissible or other accountants could offer similar testimony.

The defendants argued that they suffered prejudice because the memories of key witnesses had faded. The district court

found that the memories of key witnesses were impaired in material areas by the delay. This finding was supported by depositions and grand jury testimony where witnesses repeatedly stated that they could not recall in response to the defendants' questions.

Even if this court accepts the district court's finding that the witnesses actually forgot relevant information due to the preindictment delay, there is nothing in the record to indicate how the witnesses would have testified had their memories not dimmed. The defendants offer only speculation. *See Talbot*, 51 F.3d at 185. Furthermore, the district court again failed to consider if alternative sources of evidence were available. *See Horowitz*, 756 F.2d at 1405.

The defendants contend that they were prejudiced by the loss of numerous documents. The majority of Far Western's loan files were sold or transferred and are no longer traceable. Only 1.5% of the loan files are still in the FDIC inventory. The defendants contend that while failed loan files have been preserved by the government, the safe loans, which were sold to other financial institutions, are not available for use during trial. They argue that this evidence would show that 90% of the loans were paying as agreed. Further, defendants argue that the lost files prevent them from adequately cross examining the bank regulators. The district court found that these missing files constitute a loss of exculpatory evidence which prejudiced the defendants.

The defendants did not prove that the files would show that the majority of loans were "safe." *See Talbot*, 51 F.3d at 185. They also did not show that no alternative sources of the evidence existed. *See Horowitz*, 756 F.2d at 1405. Furthermore,

the missing loan files can be charged against the government's position.

Defendants also contend that they were prejudiced because the CSBD work papers were destroyed. These documents are destroyed in the ordinary course of business following an investigation. They argue that these records would confirm a difference of opinion between state and federal regulators. The district court agreed.

The defendants did not prove that these documents were lost because of the preindictment delay. They were destroyed in the ordinary course of business. The defendants also did not show that these documents would be helpful. They only speculate that the work papers would differ from the examiners' final reports and would reveal a difference of opinion between state and federal regulators. *See Talbot*, 51 F.3d at 185. Furthermore, even assuming this evidence was exculpatory, the district court did not consider alternative sources of the evidence. *See Horowitz*, 756 F.2d at 1405. The defendants did not show, for example, that the regulators themselves could not testify.

The district court found that the defendants suffered anxiety and lost opportunity from the government's extended investigation. This court has never found actual prejudice due to anxiety or lost opportunities caused by a preindictment delay. Even assuming such harm could prejudice the defendants sufficiently to violate their due process rights, nothing in the record shows that the defendants suffered any unique anxiety or lost opportunity. It is not enough to complain of anxiety that would be suffered by any person subject to a criminal investigation. *See United States v. Tucker*, 8 F.3d 673, 676 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1230 (1994) (three-year delay in hearing an appeal.)

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Because the defendants did not show actual, nonspeculative harm from the preindictment delay, the district court's finding of actual prejudice was clearly erroneous.

Having found actual prejudice, the district court then balanced the length of the delay and the extent of the prejudice suffered against the proffered reasons for the delay. Because we find that the district court's finding of actual prejudice was clearly erroneous, we need not reach the second prong of the test. *Talbot*, 51 F.3d at 185.

The district court also dismissed the money laundering charges since they were derivative of the dismissed fraud charges. Because we reinstate the bank fraud charges, the money laundering charges should also be reinstated since the district court never found that these charges themselves violated the defendants' due process rights.

For the above reasons, we reverse the district court's dismissal of the indictment.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA FILED JANUARY 6, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CRIMINAL NO. 93-1446-R

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD L. BURNS (1) DAVID W. WATT (2) JOYCE C. BURNS (3) ROCCO J. FABIANO (4)

Defendants.

ORDER GRANTING IN PART GOVERNMENT'S MOTION FOR RECONSIDERATION OF ORDER OF SEPTEMBER 6, 1994 AND DENYING DEFENDANTS' MOTION FOR RECONSIDERATION

On September 6, 1994, the Court issued an Order granting in part Defendants' motion to dismiss the Indictment due to Government delay ("Order"). The Order dismissed Counts 1, 2, 18-26, and 29-30 of the Indictment in the present case. The matter now comes before the Court on cross-motions for reconsideration of the Order. The Court heard oral argument on the cross-motions for reconsideration on December 15, 1994. After careful consideration of both motions, and for the reasons stated below, the Court alters the result of the Order only to reinstate Count Thirty.

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The Government's motion for reconsideration attempts to demonstrate both factual and legal errors in the Order. The Government succeeds in demonstrating only that the Court erred on the basis of the facts with regard to Count Thirty in its Order of September 6, 1994.

In their motion for reconsideration,[1] the Defendants present additional factual evidence to show that the remaining counts should be dismissed. This additional evidence, however, is insufficient to merit dismissal of any of the remaining counts.

The Court affirms the Order with regard to the Order's conclusions of law generally and with regard to the conclusions on all counts with the exception of Count Thirty. The evidence before this Court shows that the Government considered the case against Defendants dead in 1989. The Government then resurrected the case in 1991 and obtained indictments in 1993, over seven years after the alleged illegal conduct occurred. This culpable delay by the Government, when weighed along with the resulting presumptive and actual prejudice, violates the Defendants' due process rights and requires dismissal of Counts 1, 2, 18-26, and 29.

BACKGROUND[2]

In accordance with *Doggett v. United States*, 112 S. Ct. 2686 (1992), and the Ninth Circuit's preindictment delay standard in

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1. The motion, filed by Richard Burns, is joined by Defendants Watt and Fabiano. Defendant Joyce Burns did not join in the motion.

2. The factual background in the present case is discussed in the Order of September 6, 1994 at 2-5.

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United States v. Butz, 982 F.2d 1378 (9th Cir. 1993), and *United States v. Moran*, 759 F.2d 777 (9th Cir. 1985), the Order followed a three-step analysis in evaluating the Defendants' motion to dismiss: (1) whether there was presumptive prejudice under *Doggett*; (2) whether there was actual prejudice and to what degree; (3) whether there were reasons for the delay and whether the reasons for the delay weighed in favor of the Defendants or the Government.

(1) Presumptive prejudice: The Order first noted that the time of delay begins based on the dates of the "core acts" alleged in the Indictment rather than on the date of the last overt act alleged in the Indictment. The core acts occurred from April, 1986 to the fall of 1989. The acts thus occurred from over seven years before the date of the Indictment to over four years before the Indictment. The Order concluded that this delay gives rise to a presumption of prejudice under *Doggett*. (Order at 16.)

(2) Actual prejudice: The Order determined that Defendants successfully demonstrated actual prejudice by relying on four considerations: (i) the deaths of two key witnesses; (ii) lost documents; (iii) the damaged recollection of key witnesses; and (iv) anxiety and lost opportunities suffered by Defendants as a result of the delay. (Order at 17-23.)

(3) Weighing the Government's reasons for the delay against the prejudice suffered by Defendants: The Order evaluated the degree of actual prejudice on the sliding scale established by *Doggett* in which the showing necessary to find prejudice decreases in inverse proportion to the length of the delay. (Order at 21-22.) Relying on *United States v. Moran*, 759 F.2d 777 (9th Cir. 1985), the Order concluded that negligence on the part of the Government, and *not* bad faith, is required to

support a motion for dismissal due to prejudicial delay. The Order then analyzed each count or series of counts and determined that Counts 1, 2, 18-26, and 29-30 must be dismissed. (Order at 23-31.)

The present discussion of the cross-motions for reconsideration of the Order will address the arguments raised by the parties as the arguments apply to the three-part analysis followed in the Order.

I. Presumption of Prejudice Due to Preindictment Delay

The Court remains unpersuaded by the Government's arguments that the presumption of prejudice does not apply in cases of preindictment delay. The Court affirms its conclusion in the Order that the presumption of prejudice applied by the Supreme Court in *United States v. Doggett*, 112 S. Ct. 2686 (1992), is applicable in preindictment delay cases as well as postindictment delay cases.

The Government correctly notes that the statute of limitations for crimes provides "the primary guarantee against bringing overly stale criminal charges." *Lovasco*, 431 U.S. at 789 (quoting *United States v. Marion*, 404 U.S. 307, 322 (1971)). The statute of limitations, however, "does not fully define a defendant's rights with respect to events occurring prior to indictment." *Marion*, 404 U.S. at 322. The Fifth Amendment Due Process Clause protects against prejudicial delay even within the statute of limitations.[3]

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3. The Court notes that, after the alleged commission of the key crimes named in the Indictment, Congress amended the statute of limitations with

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The Government correctly observes that the Fifth Amendment Due Process Clause and not the Sixth Amendment Speedy Trial Clause provides protection against preindictment delay. The Sixth Amendment right to a speedy trial attaches only after formal accusation. *Lovasco*, 431 U.S. 783, 788-89 (1977). The Government contends that the presumptive prejudice standard consequently applies only in Sixth Amendment Speedy Trial Clause cases; *i.e.*, only postindictment cases. According to the Government, the Speedy Trial Clause protects different interests than the Due Process Clause of the Fifth Amendment. Therefore, according to the Government, the Court errs in relying on *Doggett*'s presumption of prejudice because *Doggett* was a Speedy Trial Clause case and the present case is a Due Process case. The Court rejects the Government's contention of error.

The interests protected by the Fifth Amendment and the Sixth Amendment do differ in some respects. The Sixth Amendment Speedy Trial Clause protects against 1) "oppressive pretrial incarceration," 2) "anxiety and concern of the accused," and 3) "the possibility that the [accused's] defense will be impaired by dimming memories and loss of exculpatory evidence." *Doggett*, 112 S. Ct. at 2692. While the Court has not been presented with an opinion that clearly summarizes the specific interests protected by the Fifth Amendment in preindictment delay cases, the Ninth Circuit test demonstrates that the Due Process Clause protects a defendant against

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respect to crimes named in Counts 1 and 2 in the Indictment, enlarging the statute of limitations for bank fraud from five years to ten years. *See* 18 U.S.C. § 3293. The fact that Congress treats the statute of limitations as a flexible concept underscores the important role of the Due Process Clause in protecting against prejudicial delay even within the statute of limitations.

prejudice arising from an unjustified delay attributable to the Government. *See United States v. Moran*, 759 F.2d 777, 781-82 (9th Cir. 1985).

The interests protected by the Fifth Amendment and Sixth Amendment thus differ in at least one respect: the Sixth Amendment Speedy Trial Clause protects against pretrial incarceration while the Fifth Amendment does not protect against incarceration in the preindictment context.

The Sixth Amendment's protection against "anxiety and concern of the accused," however, is not necessarily exclusive to the Sixth Amendment. In cases where a person suffers numerous and successive investigations by government agencies over a period of several years before an indictment is finally issued, the person under investigation suffers much of the same anxiety and concern experienced by a person formally accused by the Government. Although the person under investigation may not experience the same public embarrassment that may accompany formal public accusation, the anxiety of not knowing whether a formal indictment is forthcoming is perhaps an even greater cause for anxiety.

The final interest protected by the Sixth Amendment, the need to preserve exculpatory evidence, is identical to the primary interest protected by the Fifth Amendment. The Supreme Court has noted that the need to preserve exculpatory evidence is also the most important interest protected by the Sixth Amendment because " 'the inability of a defendant adequately to prepare his case skews the fairness of the entire system.' " *Doggett*, 112 S. Ct. at 2692 (quoting *Barker v. Wingo*, 407 U.S. 514, 532 (1972)). The defendant's inability to prepare his case due to delay applies equally to the preindictment context

as the postindictment context; thus, the primary purposes of the Fifth Amendment in the preindictment context and the Sixth Amendment Speedy Trial Clause are identical.

More importantly, the *Doggett* Court relied *exclusively* on the interest of allowing the defendant to preserve exculpatory evidence to support the Court's conclusion that a presumption of prejudice is warranted in cases involving substantial delay. *Doggett* 112 S. Ct. at 2692. Because the primary interest protected by the Fifth Amendment in preindictment delay cases is the prevention of the loss of exculpatory evidence, the presumption of prejudice applied by the Supreme Court in postindictment delay is equally applicable to preindictment delay cases.

In fact, the need for protection in the preindictment context is even stronger than in postindictment situations. Prior to indictment, the defendant is subjected to the anxiety of not knowing whether charges will ultimately issue against the defendant. Even more importantly, until charges actually issue, the defendant has no reason to preserve any evidence. This is particularly true where the Government completely ends its investigation and declines to seek charges against the parties under investigation. Justice Douglas's observations regarding the "special disadvantage" facing defendants subjected to preindictment delay are especially applicable in instances where the Government reopens a stale case which was long considered closed by the Government:

> With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime.

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> Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused become less able to make out his defense.

United States v. Marion, 404 U.S. 307, 331, n.3 (1971) (Douglas, J., concurring) (quoting *Nickens v. United States*, 323 F.2d 808, 813 (1963).

As noted by the *Doggett* Court, defendants subjected to lengthy Government delay are placed in the enigmatic position of presenting evidence which proves favorable evidence was lost. Requiring defendants to present evidence of lost favorable evidence is no less stringent a requirement than presenting the favorable evidence itself. In cases involving a lengthy delay, a presumption of prejudice is necessary to protect the defendant's due process rights and to insure a fair trial.

The fact that the Fifth Circuit has declined to apply *Doggett*'s presumption of prejudice to preindictment delay cases *see United States v. Byrd*, 31 F.3d 1329 (5th Cir. 1994); *United States v. Beszborn*, 21 F.3d 62 (5th Cir. 1994), is not dispositive.[4]

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4. The Government also cites the Seventh Circuit cases *United States v. Anagnostou*, 974 F.2d 939 (7th Cir. 1992) and *United States v. Hatcher*, 984 F.2d 783 (7th Cir. 1993) for the proposition that *Doggett*'s presumption of prejudice does not apply in the Fifth Amendment preindictment delay context. Neither case, however, conclusively determines that *Doggett* is inapplicable to preindictment delay cases. The *Anagnostou* Court went only as far as to express "doubt" regarding *Doggett*'s applicability in the preindictment delay context. *Anagnostou*, 974 F.2d at 942, n.1. The *Hatcher* Court merely cites to *Anagnostou*, without engaging in any independent analysis, for the conclusion that *Doggett* does not apply to preindictment cases. *Hatcher*, 984 F.2d at 786,

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This Court is guided by Ninth Circuit precedent, and the Ninth Circuit has not addressed the issue of *Doggett*'s applicability to preindictment delay.[5] Furthermore, the Ninth Circuit's test regarding preindictment delay is different from the Fifth Circuit test: while the Fifth Circuit requires the defendant to prove that the Government *intentionally* delayed seeking an indictment for tactical reasons, *see Byrd*, 31 F.3d at 1340, the Ninth Circuit requires only a showing that the Government was *negligent* in its delay. *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985). Particularly in view of these differing tests of the two circuits it would be inappropriate for this Court to adopt the Fifth Circuit's approach with regard to whether prejudice may be presumed by the Court in certain cases.

Furthermore, at least two courts have already applied *Doggett*'s presumption of prejudice to preindictment cases. One case is an unpublished case from the Southern District of Florida. The other case is a published decision from the District Court for the Virgin Islands.

In the Florida case, *United States v. Foxman*, 87-6034 (S.D. Fl. 1994), Judge Hoeveler concluded that Doggett's

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n.5. In neither case was the issue of *Doggett*'s applicability squarely presented to the Seventh Circuit and in neither case did the Seventh Circuit provide a clear conclusion with regard to *Doggett*.

5. The Government's claim that the case *United States v. Breitkreutz*, 8 F.3d 688 (9th Cir. 1993), demonstrates the Ninth Circuit's refusal to apply *Doggett* in the preindictment context is unpersuasive. *Breitkreutz* was argued and submitted before *Doggett* was issued and there is no indication that the *Breitkreutz* court even had the occasion to consider whether *Doggett* applied to the facts in *Breitkreutz*. Consequently, the absence of citation to *Doggett* in the *Breitkreutz* decision is not dispositive.

presumption of prejudice operated to dismiss the case for preindictment delay. The defendant in *Foxman* was indicted for conspiracy to misapply the funds of a savings and loan institution which later collapsed. The latest action by Foxman alleged in the indictment occurred in 1983, nearly ten years before the indictment was issued. Judge Hoeveler concluded that Foxman needn't show actual prejudice because the length of the delay allowed the court to presume prejudice pursuant to *Doggett*.[6]

In *United States v. Benjamin*, 816 F. Supp. 373 (D.V.I. 1993), the district court for the Virgin Islands applied the presumption of prejudice in a case involving both preindictment and postindictment delay. The court explicitly concluded that the Government's preindictment delay violated the defendant's due process rights. In applying *Doggett*'s presumption of prejudice to the preindictment delay, the court noted that the defendant's showing that important documents were lost because of the delay was a sufficient demonstration of preindictment prejudice. *Id.* at 380-81.

This Court is in accord with the analysis employed in *Foxman* and *Benjamin*. Both as a matter of law and a matter of logic, *Doggett*'s presumption of prejudice analysis is applicable to preindictment cases. As noted in the Order of September 6, 1994, the facts in the present case give rise to a presumption of prejudice.[7] *See* Order at 15-16.

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6. At the oral hearing conducted on December 15, 1994 in the present case, counsel for the Government notified this Court that the United States Attorney's Office for the Southern District of Florida has obtained approval from the Solicitor General to appeal Judge Hoeveler's decision in *Foxman*.

7. The Government contends that the Court erred in marking the delay

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II. Showing of Actual Prejudice

The Government contends that, in order to show actual prejudice, the Defendants must specifically prove that the evidence lost as a consequence of the Government's delay was exculpatory evidence. In several instances, Defendants have successfully shown that the Government's delay allowed the destruction of exculpatory evidence. In the final analysis, however, the Court engages in a balancing process which permits the Court to consider presumptive prejudice, prejudice arising from lost evidence proven to be exculpatory, and lost evidence not proven to be exculpatory.

Doggett empowers a court to consider *both* missing evidence which defendants could prove would have been exculpatory and missing evidence which defendants could not prove would have been exculpatory. *Doggett*, 112 S. Ct. at 2692. ("consideration of prejudice is not limited to the specifically demonstrable"). *See also United States v. Packer*, 857 F. Supp. 726, 733 (C.D. Cal. 1994) (a four-year delay "creates a presumption of prejudice sufficient to excuse the defendant from needing to make a showing of actual prejudice").

The Government argues that, to prevail in proving actual

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from the core acts rather than from the last overt act alleged in the conspiracy. The case cited by the Government, *United States v. Mays*, 549 F.2d 670 (9th Cir. 1977), however, is not persuasive. In measuring the delay, the *Mays* court did, in fact, mark the period from the date of the last overt act. *Id.* at 678. The facts in *Mays*, however, indicate that *all* the acts alleged in the indictments occurred within the span of less than one year. *Id.* at 672. Consequently, the *Mays* court did not have occasion to consider whether to mark the delay from commission of the core acts.

prejudice, the Defendants have the burden of proving that lost evidence would have been exculpatory. Although Ninth Circuit cases prior to *Doggett* imposed a heavy burden on the defendant to prove explicitly how the loss of a witness and/or evidence is prejudicial to his case, *see, e.g., United States v. Butz*, 982 F.2d 1378, 1380 (9th Cir. 1993), the case law does not specifically require the defendant to show that the lost evidence was *exculpatory*.

The evidence is overwhelming in the present case that the passage of time has caused the destruction of key evidence to the prejudice of the Defendants. In some instances, Defendants have successfully demonstrated that the evidence would have been favorable to Defendants, while in other instances, the absence of the evidence prevents a determination regarding the favorable character of the evidence.

1. The Deaths of Witnesses

The Government argues that the Order mistakenly concluded that the death of FDIC regional director John Sexton would prejudice Defendants. The Government's arguments, however, are unconvincing. Sexton's November 15, 1990 letter does, on its face, indicate that Sexton could have provided exculpatory evidence. Furthermore, as author of the letter and regional director of the FDIC, Sexton is a key witness who was in a more knowledgeable position than other FDIC regulators. Finally, Defendants have demonstrated that the other regulators have virtually no recollection of key events. (*See* Def.'s Opp'n at 15 n.12.) Consequently, Sexton's death was, in fact, prejudicial to Defendants.

The Court is similarly unpersuaded by the Government's

arguments that Al Neubauer's testimony would not have been helpful to the Defendants. Neubauer's testimony that he believed it would have been illegal for the insurance commissions from RSIA, Inc. to flow back to Far Western Bank is helpful to Defendants' case regardless of Neubauer's testimony that Defendants were not employees of RSIA, Inc.

2. Loss of Recollection of Key Witnesses

The Government contends that the Order mistakenly concluded that some witnesses' loss of memory was prejudicial. (Gov. Mot. at 14.) Even if the Court agreed with the Government that the testimony of the few witnesses mentioned by the Government would not be prejudicial, Defendants have presented substantial evidence that the lost recollections of many other key witnesses amounts to actual prejudice. (*See* Order at 19-20; Fourth Decl. of Grauer, Exh's I, N, O, EE, FF, GG, LL, and MM; Fifth Decl. of Grauer, Exh's AAA, BBB.).

3. Destruction of Work Papers

The Government argues that the California State Banking Department work papers are destroyed in the ordinary course of business in the year following the investigation. The authority for the Government's conclusion regarding the time frame for destruction of the work papers, however, is unclear at best. (*See* Price Decl., Gov. Resp. of Aug. 2, 1994, Exh. 5. (stating that "useful" work papers are retained while other work papers are destroyed at an unspecified date).) Even if the work papers are destroyed only a year after the investigation, prejudice still exists because the papers *were* available at some time before the Indictment issued.

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As discussed in the Order, Defendants have demonstrated actual prejudice. The few elements of actual prejudice disputed by the Government in the Government's motion for reconsideration do not alter the Court's conclusion that Defendants suffered actual prejudice.

III. The Proffered Reasons for the Delay

The Government objects to the Order on both legal and factual grounds with regard to the Court's analysis of the reasons for the delay. First, the Government contends that the Defendants must prove that the delay was intentional rather than merely negligent on the part of the Government. Second, the Government attempts to demonstrate that the Government was not negligent with regard to the delay.

The Government's legal contentions are in error. The Defendants need only prove negligence and *not* intentional delay on the part of the Government. As noted above (Section I), the Ninth Circuit does not require that a defendant prove intentional delay by the Government; a showing of negligence is sufficient. *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985); *see also United States v. Mays*, 549 F.2d 670, 678 (9th Cir. 1977) ("negligent conduct can also be considered, since the ultimate responsibility for such circumstances must rest with the government rather than the defendant").

With regard to the facts surrounding the delay, the Government contends that "there has been no delay" in the present case. (RT, December 15, 1994, at 38.) The Government explains that the United States Attorney Office ("USAO") for the Southern District of California first began investigating the relationship between Far Western Bank and Imperial Savings in

January, 1991. (*See* RT at 38.) The Government argues that the approximately thirty-three months between the time the Southern District USAO began its investigation and the issuance of the Indictment was necessary to investigate the facts in the present case. (*See* RT at 39-41.)

The Government, however, fails to adequately account for the passage of time from the alleged commission of the initial crime in 1986, to the Southern District of California's investigation of Far Western Bank commencing in January, 1991. Even if the Court were to agree with the Government that the period from January, 1991 to November, 1993 was necessary for the Southern District's investigation, the Government's failure to pursue an indictment at an earlier time is sufficient to attribute negligence to the Government.

The chronology of the key events is as follows. The Defendants engaged in the core acts giving rise to the charges in Counts One and Two in March, 1986. In September, 1987, the FDIC issued the FDIC report regarding the civil unlawful acts in connection with Far Western Bank. In December, 1987 the FDIC referred the Far Western Bank investigation to the FBI for criminal investigation.[8] In March, 1988, the grand jury for the

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8. The Government contends that the Order erroneously states that the FDIC turned over to the FBI the financial records of RSIA, Ltd., Richard Burns, and David Watt as part of its criminal referral in 1987 because the FDIC never possessed any of these financial records. The financial statements of RSIA, Ltd., however, were attached to the 1987 FDIC Examination Report which was subpoenaed by the Grand Jury in 1988. (*See* Fourth Decl. of Grauer, Exh. NN.) The Defendants do not demonstrate that the FDIC had access to the records of Richard Burns or David Watt. The 1987 FDIC Examination Report, however, noted that the RSIA, Inc. commissions were being funneled through RSIA, Ltd. (Cont'd)

Central District conducted hearings regarding Far Western Bank. In June, 1988; the FDIC reported the sale of loans from Far Western Bank to Imperial Savings. In January, 1989, the Central District for California declined to prosecute Far Western Bank. (RT at 41.) An attorney from the USAO for the Southern District was assigned to investigate the case on December 29, 1989. (RT at 42, 50.) The investigation did not focus on Far Western Bank, however, until January 31, 1991. After the initial assignment in December, 1989, the Southern District case was subsequently assigned to three other Assistant U.S. Attorneys before the Indictment was finally issued in November, 1993.

The Government offers no compelling reason for the delay from the commission of core acts in 1986 to the time that the Southern District began its investigation of Far Western Bank in 1991. The Central District investigated Far Western Bank and declined to prosecute the case in January, 1989. After January, 1989, the Far Western Bank case was not simply dormant; the case was dead. The Southern District, however, resurrected the Far Western Bank case in January, 1991 that had been declared dead by the Central District two years earlier. The Government does not account for the two year period before the Southern District exhumed the case except to state that the Southern District was unaware of the Central District's investigations and that the Southern District investigated several Imperial Savings

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(Cont'd)

and Richard Burns was a shareholder in RSIA, Ltd. at that time. (*See* Fourth Decl. of Grauer, Exh. E.) The FDIC knew that David Watt was a former shareholder. (*See Id.*) As a result, the Government did have the necessary information to determine that Burns and Watt had benefitted from the RSIA insurance arrangement. Consequently, the fact that the FDIC didn't actually possess the records of Burns and Watt in 1987 does not alter the Order's factual basis for determining Government culpability.

relationships before discovering Far Western Bank's involvement. (RT at 42-44.)

The Court finds this two-year "dead" period to be particularly disturbing in evaluating the Government's negligence. The fact that the investigations were conducted by two separate USAO's does not diminish the Government's neglect; knowledge possessed by one branch of the Government is properly attributed to other branches, particularly where, as here, those branches fall under the supervision of the same agency. Whether the offices are in San Diego or Los Angeles, it is the same Government, and the delay is attributable to the Government.

In short, the case against Far Western Bank was completely dropped and forgotten by the Government in 1989, and then resurrected by the same Government in 1991. The nature of the Government's delay, coupled with the great length of the delay, amounts to negligence in pursuing in the case against the Defendants with regard to the Far Western Bank allegations. This negligence weighs heavily against the Government in determining whether a due process violation exists with regard to the delay.

IV. Weighing the Government's Delay Against the Prejudice Suffered: Determination as to Each Respective Count

A. Counts 1 and 2

As noted in the Order of September 6, 1994, Count One, alleging conspiracy to defraud a financial institution, and Count Two, alleging fraud against Far Western Bank, rest almost exclusively upon the participation of Richard Burns, Joyce

Burns, and David Watt in the RSIA Ltd. partnership. The core of these charges involves the structuring of the partnership in 1986. (*See* Order at 27.)

The delay between the commission of the core acts for these charges and the issuance of the Indictment is nearly eight years. The Government has failed to adequately account for the delay despite the fact that the existence of the partnership and its structure was known to Government investigators at least five years before the Government obtained an Indictment in 1993. The prejudice suffered by Defendants with regard to Counts One and Two is particularly strong. (*see* Section II, above; Order at 17-23.) For these reasons, the Court affirms its conclusion that the charges contained in Counts One and Two violate the Defendants' due process rights and must therefore be dismissed.

B. Count 3

Count Three, which charges all four Defendants with defrauding Imperial, is based on allegations that Fabiano was negotiating an employment contract with Far Western Bank at the same time he approved an agreement between Imperial Savings and Far Western Bank. Defendants contend that the acts challenged in Count Three actually began in 1987, and that the Government discovered the alleged acts through investigations in 1987 and 1988.

Defendants' argument regarding the relevant dates fails. Count Three charges Defendants with entering into a "scheme or artifice to defraud Imperial Savings Association of its intangible right to the honest services of Rocco J. Fabiano." Charge Three specifically alleges that Defendants attempted to accomplish their "scheme or artifice" from 1988 to 1989 by negotiating the

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Fifth Addendum to the Master Purchase and Servicing Agreement between Far Western Bank and Imperial Savings at the same time he was negotiating an employment contract with Far Western Bank. The Order therefore properly considered the dates of the *core* acts as 1988 to 1989; the relevancy of activities prior to the dates alleged acts are properly considered as an element in determining the degree of prejudice and not in determining the length of the delay or the Government's culpability with regard to the delay.

Because the alleged activities occurred between November, 1988 and October, 1989, the preindictment delay is between four and five years. There is no evidence that the alleged activities were investigated prior to late 1989. The Central District investigation focused only on Far Western Bank, not Imperial Savings. The Government's delay of approximately three years from the time of discovery is insufficient to support a finding of governmental negligence with regard to Count Three. Absent a finding of governmental culpability for the delay, the Court concludes that the Order of September 6, 1994 properly refused to dismiss Count Three.

The Court also notes that Defendants have not demonstrated sufficient prejudice from the delay. The fact that Defendants could have relied on lost evidence to show lack of motive is not a sufficient showing of prejudice; the lost evidence must bear more directly on the crime charged. The Court affirms its refusal to dismiss Count Three.

C. Counts 4-12: Bribery

As noted in the Order, the delay with regard to Counts Four through Twelve is approximately four and one-half years, and

the Government did not discover the alleged acts until late 1989 and early 1990. (Order at 28.) The delay is insufficient to allow a presumption of prejudice. The delay does not indicate negligence on the part of the Government and nothing presented by the Defendants in their motion for reconsideration suggests that the Government was negligent in pursuing the charges. As in Count Three, the Defendants' failure to demonstrate culpability on the part of the Government precludes dismissal of Counts Four through Twelve. Also as in Count Three, Defendants have failed to show sufficient actual prejudice resulting from the delay.

D. Counts 13-17: False Tax Returns

As with Counts Four through Twelve, Defendants contend that Counts Thirteen through Seventeen should be dismissed because the Counts are "derivative" from Counts One and Two and because lost evidence could have proved a lack of motive. The delay with regard to these charges, however, is between three and one-half years and four and one-half years and Defendants have not shown how the delay is attributable to the Government's negligence. Consequently, the Court affirms its refusal to dismiss Counts Thirteen through Seventeen.

E. Counts 18-26: Partnership Money Laundering

Counts Eighteen through Twenty-Six each require the Government to prove that the money allegedly "laundered" was derived from the criminal activity of bank fraud. Consequently, Counts Eighteen through Twenty-Six depend directly on the Government first proving the Defendants' guilt with regard to the bank fraud charges stated in Counts One and Two. Because the Court affirms its dismissal of Counts One and Two, The Court

also affirms its dismissal of Counts Eighteen through Twenty-Six.

F. Counts 27-28: Imperial Money Laundering

Defendants argue that if the Court dismisses the bribery counts (Counts Four through Twelve), the Court must, *a fortiori*, dismiss Counts Twenty-Seven and Twenty-Nine. The Court, however, has affirmed its decision not to dismiss the bribery counts. Consequently, the Court also affirms its decision to preserve Counts Twenty-Seven and Twenty-Eight.

G. Count 29: False Statement by Richard Burns

The Government contends that Count Twenty-Nine should not have been dismissed because Defendants failed to demonstrate how they were prejudiced with respect to Count Twenty-Nine. As noted in the Order, however, two of the witnesses who allegedly knew and tacitly approved of Burns' involvement are deceased. (Order at 30.) Furthermore, prejudice may be presumed based on the length of the delay, which is more than seven years from the occurrence (in April 1986) and approximately six years from discovery by the Government. The Government's substantial delay amounts to negligence on this Count. When weighed along with the actual and presumed prejudice, the Government's negligence in delay requires dismissal of Count Twenty-Nine.[9]

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9. The Court notes that the word "become" on page 30, line 18 of the Order of September 6, 1994 should read "became." "Relay" on page 32, line 2 of the Order of September 6, 1994 should read "rely."

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H. Count 30: False Statement by David Watt

The Court, however, agrees with the Government that Count Thirty should not have been dismissed. Count Thirty charges David Watt with making a false statement in November of 1987 when he told bank examiners that he had sold his interest in the RSIA, Ltd. partnership. This Count involves less delay than Count Twenty-Nine and there is no clear evidence that the Government knew of Watt's false statement prior to 1992.

The only evidence before this Court regarding the Government's knowledge of Watt's false statement is a letter from the FDIC to the FBI regarding the criminal referral in 1988. The letter notes only that the FDIC "question[s] why Mr. Watt and Mrs. Burns would sell their share in such a profitable operation for such an insignificant sum [of $10 each]." (Fourth Decl. of Grauer, Exh. BB.) Without a clear showing of Government knowledge regarding Watt's false statement prior to 1992, the Court is unwilling to find that the Government was negligent in pursuing this charge.

Defendants have also failed to demonstrate how Defendants have suffered actual prejudice by the delay. Absent a showing of Government negligence in the delay and absent any showing of at least lost key evidence, the Court cannot conclude that Count Thirty should be dismissed. For this reason, the Court now reinstates Count Thirty.

I. Count 31: False Statement by Rocco Fabiano

The Defendants present no new arguments with regard to the Court's refusal to dismiss Count Thirty-One. Consequently, the Court affirms its denial of Defendants' motion to dismiss Count Thirty-One.

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V. Conclusion

The Court affirms its conclusion that *Doggett*'s presumption of prejudice applies equally to cases of preindictment delay as to cases of postindictment delay. The facts in the present case give rise to a presumption of prejudice with regard to Counts 1, 2, 18-26, and 29. The presumption of prejudice, when weighed along with both the actual prejudice suffered by Defendants as a result of the delay and especially the Government's negligence in connection with the delay, requires dismissal of Counts 1, 2, 18-26, and 29.

For the reasons stated above, the Court affirms its Order of September 6, 1994 dismissing Counts 1, 2, 18-26, and 29. The Court revises the Order with regard to Count 30: Count 30 is reinstated.

IT IS SO ORDERED
DATE: 1/4/95

s/ John S. Rhoades, Sr.
JOHN S. RHOADES, SR.
UNITED STATES DISTRICT JUDGE

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APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA FILED SEPTEMBER 6, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CRIMINAL NO. 93-1446-R

UNITED STATES OF AMERICA

Plaintiff,

v.

RICHARD L. BURNS (1) DAVID W. WATT (2) JOYCE C. BURNS (3) ROCCO J. FABIANO (4)

Defendants.

ORDER GRANTING IN PART MOTION TO DISMISS INDICTMENT DUE TO GOVERNMENT DELAY

This matter is before the Court on motions by defendants Richard Burns, David Watt, Joyce Burns and Rocco Fabiano to dismiss the indictment. Defendants argue that the Government's delay in bringing the indictment against them has violated their fundamental rights to due process of law under the Fifth Amendment of the United States Constitution. After careful consideration of the pleadings and arguments in this matter, the Court finds that the delay in this case has deprived Defendants of their right to a fair trial with respect to counts 1, 2, 18-26, and 29-30, which are charges based on acts dating back to 1986. In these counts, the many years which have passed since the dates of the alleged acts, and the Government's negligence in prosecuting

these charges, constitute a violation of the Defendants' due process rights. With respect to the remaining counts, however, the Court finds that the delay, although great, was not sufficient to warrant dismissal on grounds of pre-indictment delay. For the reasons set forth below, the motion to dismiss the indictment is GRANTED in part, and DENIED in part.

BACKGROUND

On November 5, 1993, Defendants were named in a 31-count indictment charging them with various violations of federal law relating to their involvement in the operation of Far Western Bank ("Far Western"), a Tustin, California bank, and Imperial Savings Association of San Diego, California ("Imperial"). The Government alleges that in early 1986 Richard Burns, Joyce Burns, and David Watt contacted the Federal Deposit Insurance Corporation ("FDIC") and California State Banking Department ("CSBD") and inquired about the possibility of acquiring Far Western. After negotiations, the FDIC and CSBD agreed to permit Joyce Burns to acquire $2 million of Series A Preferred Stock (20,000 shares) in Far Western. Joyce Burns and David Watt became directors. As a condition of the arrangement, however, Richard Burns was required to submit a written assurance that he would not participate directly or indirectly in the affairs of Far Western.[1]

The Government alleges that immediately after obtaining control of Far Western in April of 1986, Richard Burns, Joyce

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1. Richard Burns and his former employer, NuCorp Energy Inc., had been the subject of a Securities and Exchange Commission action alleging stock manipulation and fraud for pre-billing receivables in order to inflate the value of the NuCorp stock. Burns was enjoined from participating in further such activities.

Burns, and David Watt adopted a business plan ("Business Plan") for Far Western in which Far Western granted a high volume of automobile loans to individuals with poor credit histories. Simultaneously, Richard Burns, Joyce Burns and Watt entered into a limited partnership entitled RSIA, Limited, ("the Partnership") in which the Partnership would receive 92% of the net income of the Roger Steele Insurance Agency, Inc. ("RSIA Inc."). Under the terms of the Partnership, Richard Burns owned 42.1%, Joyce Burns owned 42.1%, David Watt owned 14.8%, and 1% was owned by RSIA Inc, the insurance agency. Richard Burns, Joyce Burns and David Watt thereby became the sole insurance agents for Far Western. As such, Richard Burns, Joyce Burns and David Watt received insurance commission income generated by the lending practices of Far Western.

After bank regulators became aware of this arrangement in the Fall of 1987, Joyce Burns and David Watt sold their shares in the Partnership to Richard Burns for $10 each: a sale which the Government contends was a sham transaction. Allegedly, both Joyce Burns and David Watt continued to receive their $10,000 salary from the Partnership, and their periodic distribution of the partnership profits throughout Far Western's existence.

Richard Burns, Joyce Burns, and David Watt allegedly represented to the bank regulators on February 26, 1988 and March 1, 1988 that they would contribute or had contributed to Far Western all income they had received from the Partnership in connection with insurance policies placed on loans originated and held by Far Western. The defendants continued, however, to receive their partnership profits. The Government alleges that from approximately 1986 through 1990, the insurance commission income flowing to Richard Burns, Joyce Burns, and David Watt totalled approximately $10 million.

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In late 1987, bank regulators became concerned with the large volume of automobile loans Far Western was carrying, and prohibited the bank from purchasing further automobile loans unless a purchaser for the current loans could be found. In November of 1987, Far Western established a relationship with Imperial Savings Association ("Imperial"), whereby Imperial purchased approximately $450 million in auto loans from Far Western. Co-defendant Rocco Fabiano was an executive vice-president of the Imperial, and was responsible for Imperial's mortgage banking and consumer lending activities.

The Government alleges that under Fabiano's direction, Imperial entered into agreements with Far Western Bank which were detrimental to Imperial but greatly profitable for Far Western. Specifically, the Government alleges that in December of 1988, Fabiano negotiated an agreement between Imperial and Far Western which resulted in a gain by Far Western of approximately $11 million, at an unspecified cost to Imperial. Fabiano was allegedly compensated (bribed) by his co-defendants for those services.

In March of 1989, shortly after entering into such an agreement, Fabiano received three checks, one each from the individual accounts of Richard Burns, Joyce Burns, and David Watt, totally $50,000. Fabiano falsely stated on his income tax forms that the checks were from Far Western, rather than the individuals.

In December of 1990, Far Western was taken over by regulators with resulting losses incurred by the FDIC insurance funds and all minority shareholders.

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DISCUSSION

Defendant Richard Burns moved this court on May 2, 1994, to dismiss the 31-count indictment due to pre-indictment delay. His motion was joined by defendants Watt, Fabiano and Joyce Burns. Defendants argued that the charges in the indictment all arise from the Business Plan, which was implemented in 1986. The Plan was investigated by the FDIC in 1986 and 1987, and by the FBI in 1988, but no criminal actions were taken at that time.

Under the Fifth Amendment, no defendant may be denied due process of law as a result of pre-indictment delay. *U.S. v. Valentine*, 783 F.2d 1413, 1416 (9th Cir. 1986). The Ninth Circuit has adopted a two-pronged test to determine if pre-indictment delay constitutes a denial of due process. First, the court must determine whether the defendant suffered actual prejudice as a result of the delay. Second, if the court finds prejudice it "must balance the length of the delay with the reasons for it in deciding whether the defendants' rights were violated." *United States v. Butz*, 982 F.2d 1378, 1380 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 250 (1993).

Defendants contend that under the United States Supreme Court's recent holding in *Doggett v. United States*, 112 S.Ct. 2686 (1992), they are entitled to a presumption that they were prejudiced by the delay, due to the number of years of delay in this case. In the alternative, Defendants present evidence that they suffered actual prejudice, and that the prejudice was a result of Government negligence.

Finally, defendants argue that the cause for the delay in this matter was the Government's failure to diligently pursue the investigation. Defendants note that many of the actions alleged

in the indictment were considered for prosecution by the United States Attorney's Office in the Central District of California, and that office declined to prosecute. The case was then investigated by the Southern District for several more years prior to the indictment. As such, Defendants contend that under *Butz* the prosecution is barred.

The motion thus presents a three-part inquiry: (1) Based on the delay involved in this case, are the Defendants entitled to a finding of presumptive prejudice? (2) If prejudice is not presumed, have the Defendants demonstrated actual prejudice, and if so, to what degree? (3) Finally, what are the reasons for the delay, and do they weigh in favor of the Defendants or in favor of the Government? These arguments are considered, in turn, below.

I. Presumption of Prejudice Due to Pre-Indictment Delay

In *Doggett,* the Supreme Court held that a defendant, who was arrested eight and one-half years after his indictment, was prejudiced by the Government's delay, even though he was unable to demonstrate the loss of exculpatory evidence. The *Doggett* court found that such a lengthy delay was presumptively prejudicial, and that affirmative proof of particularized prejudice was not essential to the defendant's claim. *Id.* Defendants urge this Court to find that they are entitled to a finding of presumptive prejudice due to the Government's delay.

A. Application of *Doggett* to Pre-Indictment Delay

In *Doggett*, Federal Agents attempted to arrest the defendant after he was indicted, but were unable to locate him because he had left the country. Two years later, Doggett returned to the

United States, where he settled down and lived openly under his own name for six years. Nearly eight and one-half years after the indictment, the U.S. Marshall's service ran a credit check on several thousand people subject to outstanding arrest warrants, and within minutes found out where Doggett lived and worked. 112 S.Ct. at 2689-90.

Doggett moved to dismiss the indictment, claiming the post-indictment delay violated his Sixth Amendment right to a speedy trial. Further, Doggett argued that he was entitled to a finding of presumptive prejudice because the lengthy delay had destroyed his ability to prove actual prejudice.

The Supreme Court agreed, and reversed the lower court's denial of Doggett's motion to dismiss the charges. The Supreme Court noted the difficulty facing defendants who must prove, years after the alleged crime, that they were prejudiced:

> because time's erosion of exculpatory evidence and testimony can rarely be shown. . . . Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or, for that matter, identify.

112 S.Ct. at 2692-93 (internal quotations omitted). The *Doggett* decision went on to note that unreasonable delay

> threatens to preclude more than one sort of harm, including . . . anxiety and concern of the accused, and the possibility that the [accused's] defense will be impaired by

> dimming memories and the loss of exculpatory evidence.

Id. The Court emphasized the seriousness of these forms of the prejudice, due to the resulting inability of a defendant to adequately prepare his case: a result which "skews the fairness of the entire system." Id. at 2692 (internal quotations omitted).

In reaching its decision, the *Doggett* court relied extensively on earlier cases, noting that the deleterious effects of the passage of time on a defendant's ability to defend a criminal charge have been an historical concern. *See, e.g., Barker v. Wingo*, 407 U.S. 514, 532 (1972) (the *Barker* court noted that "what has been forgotten can rarely be shown." *Id.* at 532.).

In *Doggett,* the Supreme Court found that the defendant was entitled to a presumption of prejudice, and that it "is the nature of prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness." *Doggett,* 112 S.Ct. at 2693. Because the Government acted negligently in locating Doggett, and because the delay extended over a period of eight years, the court found that Doggett was entitled to a dismissal of the charges.

Defendant Burns, along with his co-defendants, contend that under the reasoning set out in the *Doggett* decision, the many years which have passed since their allegedly fraudulent activities give rise to a presumption that Defendants were prejudiced by the delay. Further, Defendants contend that the Government was negligent in delaying the prosecution for so many years, and as such, Defendants are entitled to dismissal of the indictment.

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The Government points out that *Doggett* was a case involving post-indictment delay, and argues that there are no such protections for defendants who are subjected to prosecutorial delay *prior* to indictment. The Court is unpersuaded by this position.

First, there is no logical or rational reason for applying the reasoning set out in *Doggett* to post-indictment delay, and refusing to apply the same reasoning to pre-indictment delay. The reasons which compel the Government and the courts to guard evidence against the eroding passage of time apply with equal force to both pre- and post- indictment delay. There is no device by which evidence lost and memories faded *after* the issuance of the indictment are chimerically preserved *prior* to the indictment.

In fact, the need for the protections which the *Doggett* court identified are even stronger in pre-indictment situations. Prior to indictment, the defendant is subjected to anxiety and other injuries associated with undergoing a criminal inquiry, but he or she has no right to counsel, nor means of preserving evidence or witnesses. Rather, the defendant is completely dependent on the good-faith and due diligence of the prosecutor to bring the case within a reasonable time. Only after the prosecutor seeks an indictment does the defendant have notice of the charges, so that he or she can investigate, interview witnesses and seek discovery.

Justice Douglas noted the "special disadvantage" facing defendants subjected to pre-indictment delay in his concurrence in *United States v. Marion*, 404 U.S. 331, n.3 (1971). "With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the

happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused become less able to make out his defense." *Id.* In the meanwhile, the "State may proceed methodically to build its case while the prospective defendant proceeds to lose his." *Id.* at 331.

Indeed, the importance of bringing defendants to trial without delay is a tenant of our legal system which dates back to the English courts. In 1844, one English court noted a two-year delay by the prosecution, noting:

> "[I]t is monstrous to put a man on trial after such a lapse of time. How can he account for his conduct so far back? . . . No man's life would be safe if such a prosecution were permitted. It would be very unjust."

Regina v. Robbins, 1 Cox's C.C. 114 (cited in *United States v. Marion, supra,* 404 U.S. at 328).

As further noted by the *Doggett* Court, defendants subjected to lengthy government delay are put in the enigmatic position of presenting evidence which proves favorable evidence was lost. Certainly this is no less stringent a requirement than presenting the exculpatory evidence itself. In cases involving lengthy delay, a presumption of prejudice is necessary to protect the defendant's due process rights and to insure a fair trial. Furthermore, a trial with "compromised reliability" and "skewed fairness" cannot be tolerated simply because the delay occurred before rather than after indictment.

The truth of this assertion is illustrated by the fact that in

Doggett, the Government urged the court not to apply Sixth Amendment protections. Instead, the Government argued that the "effect of the delay on adjudicative accuracy is exclusively a matter for consideration under the Due Process Clause." *Doggett*, 112 S.Ct. at n.2. The Court responded that a "defendant may invoke due process to challenge delay both before and after official accusation." *Id.*

The fact that post-indictment delays are specifically protected by the Sixth Amendment under the Speedy Trial Clause is not grounds for limiting the doctrine of presumptive prejudice to Sixth Amendment cases only. As noted in *Barker v. Wingo, supra,* the right to a speedy trial under the Sixth Amendment is a fundamental due process right which is imported to the states by the Due Process Clause of the Fourteenth Amendment (citing *Klopfer v. North Carolina,* 386 U.S. 213, 223 (1967). As such, the rights identified and protected by the *Doggett* decision fall within the rubric of fundamental due process rights, which are correctly applied in both the pre-indictment and post-indictment contexts.

While no Ninth Circuit case has explicitly applied *Doggett* in a pre-indictment situation, there is likewise no post-Doggett case holding that defendants subjected to pre-indictment delay are precluded from enjoying the protections accorded in *Doggett.* In fact, in the only Ninth Circuit case to consider *Doggett,* the Ninth Circuit held that *Doggett* applies in the "pre-trial delay context," and is generally inapplicable to appellate delay. *See United States v. Mohawk,* 20 F.3d 1480, 1485-88 (9th Cir. 1994). The *Mohawk* court did not distinguish between pre- and post-indictment delay, both of which may be characterized as "pretrial." To the contrary, the *Mohawk* court noted that the distinguishing factor in delay cases is the *effect of the delay on*

the evidence. In the appellate context, the trial transcript serves to preserve testimony from the effects of delay, and as such, a defendant's rights to fair adjudication of his claims not prejudiced. *Id.* at 1488.

Nevertheless, the Government contends that the Court is precluded from finding that the pre-indictment delay violated the Defendants' due process rights because the case was prosecuted within the applicable statute of limitations. On August 9, 1989, Congress amended the applicable statute of limitations, lengthening the maximum period for prosecution from five years to ten years. *See* 18 U.S.C. § 3293 (West 1989). Absent this change many of the acts charged in the indictment would be well beyond the original five-year limitations period.

The Government contends that the Court should defer to the Congressional determination of what constitutes a "fair" delay under the 1977 case *United States v. Lovasco*, 431 U.S. 783, 792 (1977). However, the *Lovasco* court explicitly noted that while the statute of limitations is the "primary" guarantee against bringing overly stale charges, the limitations period "does not fully define [the defendant's] rights with respect to the events occurring prior to indictment. 431 U.S. at 798 (quotations omitted). In fact, the statute of limitations constitutes the outermost time limit for a prosecution, regardless of the specific circumstances of the case. Due process violations, however, may occur well within this period. The statute of limitations must always succumb to the Due Process Clause of the Fifth Amendment, the citizen's primary protection against unfair prosecutorial, as well as legislative, abuses.

Even under *Lovasco*, the Government's strongest authority,

a defendant is not required to show actual prejudice. The *Lovasco* court held that a showing of prejudice was not absolutely necessary for a defendant to assert a claim based on delay. 431 U.S. at 790 (holding that proof of prejudice is only "generally" necessary). *See also U.S. v. Crouch*, 835 F.Supp. 938, 941 (S.D.Tex. 1993). *Lovasco* notes that there are many reasons a prosecutor may delay bringing an indictment, such as the need to develop the requisite proof against co-defendants; the need to avoid multiple trials; and the need to resolve doubtful cases prior to bringing the indictment, rather than after. The decision goes on to note that prosecutors should not be penalized for deferring action until they are "completely satisfied that [they] should prosecute and will be able to promptly establish guilty beyond a reasonable doubt." *Id.* at 795.

The *Lovasco* opinion is based on facts involving an 18-month delay caused by the Government's need to continue investigation on the case. Nowhere in the *Lovasco* opinion is there language holding that an eight year delay in a case involving Government negligence is insufficient to support a dismissal on due process grounds.

In conclusion, the Court finds that defendants subjected to extreme pre-indictment delay are entitled to a finding of presumptive prejudice under the Due Process Clause of the Fifth Amendment.

B. Application to Facts of this Case

As noted above, the overt acts alleged in this case span from March 20, 1986 to March 16, 1990. As Defendants correctly point out, however, the bulk of these acts are simply payments

from one or more co-defendants to another.[2] The core allegations therefore rest primarily on three sets of acts. First, Richard Burns' agreement to refrain from involvement in Far Western in April of 1986. Second, the structuring of the Partnership in late 1986 and early 1987. Third, the structuring of the relationship between Far Western Bank and Imperial Savings Association beginning in December of 1988.

The Government further argued that it could not have known of the money laundering activities of Richard Burns and David Watt at the time of the initial FBI investigation in 1988 because the bank records of RSIA Ltd., Richard Burns and David Watt were never "subpoenaed or analyzed" by the FBI agent. Opp. to Supp. Mem. at 9 (Aug. 2, 1994). This contention is belied by fact that the records had been previously obtained by the FDIC, who turned them over to the FBI as part of its criminal referral. *See* Exhibits BB, CC, and E, Grauer Second Supp. Decl (7/13/94).

The earliest of the Defendants' core acts occurred seven and one-half years from the date of the indictment (March 20, 1986). The latest set of core acts occurred over four years from the indictment (Fall 1989). While these acts fall within the extended time period set by Congress under the amended statute of limitations, the Court finds that in this instance the 10-year

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2. The Government argues that the delay in this case should be calculated from the "last overt act" of the alleged conspiracy pursuant to *United States v. Walker*, 653 F.2d 1343, 1346 (9th Cir. 1981). While it is true that the statute of limitations on a conspiracy tolls from the last overt act, the due process inquiry at issue here involves different considerations. Specifically, the Court considers the prejudice to the defendants from the loss of witnesses and evidence. The defendants will be forced to defend the origin of the allegedly criminal activities, not the ancillary exchange of money. The delay, therefore, must be calculated from the dates that the core activities occurred.

period is inadequate to insure a fair trial. The Court finds that the delay in this case gives rise to a presumption of prejudice. Defendants have thus satisfied the first prong of the analysis.

As noted in *Doggett*, however, a presumption of prejudice alone cannot carry a claim without regard to the other *Barker* criteria. *Doggett*, 112 S.Ct. at 2693. The Court, therefore, must also consider the lengths of the delay with respect to each count, the reason for the delay, and any actual prejudice which the Defendants are able to establish.

II. Defendants Have Shown Actual Prejudice

Even if *Doggett* does not authorize this Court to find presumptive prejudice due to the Government's pre-indictment delay in this case, the inquiry continues because Defendants have shown actual prejudice as a result of the Government's negligent delay and therefore satisfy the requirements of *Butz*. In establishing actual prejudice, the Defendants must offer proof which is "definite and not speculative." *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985). Furthermore, to establish actual prejudice a defendant must show "not only the loss of the witness and/or evidence but also demonstrate just how that loss is prejudicial to him." *United States v. Mays*, 549 F.2d 670, 677 (9th Cir. 1977).

The courts have identified more than one type of prejudice resulting from pre-trial delay. While the most serious is the "dimming of memories and loss of exculpatory evidence," anxiety has also been recognized as a type of prejudice. *Doggett*, 112 S.Ct. at 2692. [3]

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3. The Court notes that the weight of consideration accorded prejudice (Cont'd)

Appendix D

A. Loss of Exculpatory Evidence

The defendants complain of the deaths of two percipient witnesses to the events underlying the indictment, the destruction of relevant and exculpating documents, and erosion of witness memories. John Sexton was the Regional Director of the FDIC and, according to the government records, actively participated in FDIC investigation of Far Western. The Defendants have supplied four letters which illustrate the significant role Sexton played in the examinations of Far Western.

Specifically, Sexton authored a letter on November 15, 1990 which illustrates his knowledge and approval of the Partnership and the insurance commissions. The letter corroborates Defendants' claim that Sexton would have provided testimony favorable to their defense. The prejudice suffered by Defendants as a result of the absence of this witness is actual and non-speculative.

The second deceased witness is A1 Neubauer, the accountant who handled RSIA Limited. Neubauer stated in an interview with the FBI that he believed it was unlawful for Far Western (rather than the Partnership) to collect the insurance premiums. In addition, Neubauer testified at length before the Grand Jury, as signified by a 280-page grand jury transcript of his testimony. Defendants point to a statement by Neubauer to the

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(Cont'd)

resulting from anxiety has been recently limited by the holding of *United States v. Hutchinson*, 22 F.3d 846, 850 (9th Cir. 1993). The *Hutchinson* court held that a showing of prejudice requires a showing that the delay prejudiced the defendant with regard to his ability to defend the case. Prejudice of a personal nature such as anxiety, by itself, is insufficient to support a finding of prejudice.

effect that he believed it would have been illegal for the insurance commissions to flow back to the assets of Far Western. These statements by Defendants' own accountant indicated that he could have provided exculpatory testimony were he available to call as a witness.

In addition, Defendants point to lost documents. Many of Far Western's loan files have been sold or transferred and are no longer traceable. Only 1.5% of the loan files are still in the FDIC inventory. The Government argues that the Defendants' interest in the insurance commissions caused them to grant "unsafe" loans. Defendants contend that while the failed loan files have been preserved by the government, the safe loans, which were sold to other financial institutions, are not available for use during trial. This constitutes a loss of exculpatory evidence which though prejudicial to Defendants, is advantageous to the Government.

The Government has identified 80 loans which were allegedly "unsafe." The Defendants report that due to the delay they have been able to locate only two of the eighty borrowers.

The State Banking Department has recently informed the parties that the work papers from the 1986, 1987 and 1988 examinations have been destroyed. Defendants contend that these record were relevant to their defense because they confirmed that significant difference of opinion existed between state and federal regulator on issues directly material to the indictment. Such a difference of opinion among regulators most certainly constitutes exculpatory evidence.

The memories of the key witnesses have suffered due to the delay, as illustrated by the depositions taken thus far. Michael

Myers, the 1987 FDIC Examiner stated that he did not know or did not recall in response to over 100 questions. Defendants contend that this is harmful to their ability to cross-examine the witness. Jerry Saylor, another FDIC examiner stated on 84 occasions during his 122-page deposition that he did not recall material information. Dennis Ankenbrand, the 1989 FDIC examiner stated 32 times in less than 100 pages that he did not recall information in material areas.

While the loss of memories can be prejudicial to both the Government and the Defendants, in this case it is particularly harmful to the defense. The fact that previous investigations were conducted into the affairs of RSIA Limited and Far Western Bank is itself potentially exculpatory. The substance of these examinations is therefore highly relevant to Defendants' defense of prior approval from the bank examiners. The examiners' loss of recollection is therefore uniquely prejudicial to Defendants in this case.

Defendants have presented a sufficient showing of lost evidence in this case to find that they have suffered actual prejudice due to the Government's delay.

B. Anxiety

In addition to the loss of evidence, Defendants also state that the extended investigation has subjected them to anxiety and concern for the past several years. In addition, Fabiano argues that he has lost significant professional and financial opportunities due to suspicion resulting from his investigation.

The Government counters that the anxiety and lost opportunities of which Defendants complain are the injuries

suffered by any defendant who is the subject of a white-collar grand jury investigation. While the court agrees this is true, it disagrees that the degree of such injuries are the same regardless of whether the investigation lasts "six days, six months or six years" as the Government appears to contend. See Opp. to Supp. Mem. at 16 (Aug. 2, 1994). Obviously, these injuries are substantially increased when the investigation continues for years and years, as it has in this case, without an opportunity to rebut the suspicions through trial.

Finally, the Court agrees with the Government's contention that with respect to this area of prejudice, Fabiano has sustained a lower degree of anxiety due to the fact that his case has been under investigation for a significantly shorter period of time.

C. Degree of Prejudice

The Government argues that the length of this investigation was comparable to other cases in which the indictments were not dismissed despite claims of excessive delay. None of the cases cited by defendant, however, involve pre-indictment delays of over five years. Furthermore, the delay in many of the cases was due to circumstances which are not present here. Finally, all but two of the cases were argued or decided prior to *Doggett*. Under the *Doggett* reasoning, actual prejudice is determined on a sliding scale, in which the showing necessary to find prejudice decreases in inverse proportion to the length of the delay.

In *United States v. Ashford*, 934 F.2d 1416, 1419 (7th Cir.), *cert. denied*, 112 S.Ct. 98 (1991) the Court found that a pre-indictment delay of four years between the beginning of the investigation and the indictment was insufficient to dismiss the indictment for pre-indictment delay. Significantly, however, this

case predates *Doggett*. Furthermore, the time period involved was less then the time period at issue in many of the counts in the present indictment.

Similarly, in *United States v. Pallan*, 571 F.2d 497 (9th Cir.), *cert. denied*, 436 U.S. 911 (1976) the court found that a four and one-half year delay was insufficient to require dismissal. Like the court in *Ashford*, the *Pallan* court was unable to rely on the holding in *Doggett*, because it had not yet been decided. Furthermore, part of the reason for the delay in that case was due to the fact that the defendant was going to trial on state charges at the time the Federal Government completed the investigation.

The case of *United States v. Anagnostou*, 874 F.2d 939 (7th Cir.), *cert. denied*, 114 S.Ct. 697 (1994), is a case outside this circuit which was also argued one month before *Doggett* was decided.

Finally, the Ninth Circuit case *United States v. Sherlock*, 962 F.2d 1349, 1353 (9th Cir.), *cert. denied*, 113 S.Ct. 419 (1992) was a case involving only three years of pre-indictment delay, and a case which pre-dated the *Doggett* decision.

In sum, the Court finds that there is no authority prohibiting this court from finding actual prejudice under the facts of this case.

III. Weighing the Government's Delay Against the Prejudice Suffered

As outlined above, Defendants are charged with numerous fraud and money laundering violations. Having established both actual and presumptive prejudice, the Court must now weigh the

lengths of the delay in the charges and the extent of the prejudice suffered against the proffered reasons for the delays. In undertaking such an analysis, the Court determines which charges, if any, constitute a violation of the Defendants' due process rights.

A. Proffered Reasons for Delay

In an affidavit filed August 2, 1994, the senior Assistant United States Attorney on the matter set forth facts regarding the history of the *Burns* investigation. In December of 1989, the investigation was renewed by the United States Attorney's Office in the Southern District. Due to the initial prosecutor's other office obligations, the investigation was transferred to a second prosecutor on March 11, 1990. The case was handled by that investigator until December 2, 1990, at which time the prosecutor left the office. The case was then transferred to a third prosecutor, who handled the case until April 24, 1991. At that time, the prosecutor became heavily involved in a different matter, and was no longer able to pursue the *Burns* investigation. The Government does not indicate who managed the case from April of 1991 until March of 1993, a two-year period. The Special Assistant U.S. Attorney currently handling the case became involved in the case on March 30, 1993, and the indictment was returned in November of 1993.

B. Applicable Standard

The Government contends that the claim of prejudice due to missing evidence is meritless without a showing of intentional bad faith by the Government. That is, Defendants must prove that the delay was an intentional devise to gain a tactical advantage over the accused. The Government cites a Seventh Circuit case,

United States v. Brock, 782 F.2d 1442 (7th Cir. 1986) in support of this contention.

In the Ninth Circuit, however, negligence on the part of the Government is sufficient to support a motion for dismissal due to prejudicial delay. This issue, and the split in authority, was specifically considered in *United States v. Moran*, 759 F.2d 777 (9th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986). In *Moran*, the Ninth Circuit held that language from the Supreme Court's decision in *United States v. Marion*, 404 U.S. 307, 324, and *United States v. Lovasco*, 431 U.S. at 2051, does not require that the defendant prove either intentional or reckless conduct on the part of the government. The *Moran* court held that the determination of whether a pre-indictment delay has violated due process is decided under a balancing test, and "we do not find that intent or reckless behavior by the government is an essential ingredient in the mix." *Id.* at 782. Rather, the court held:

> [i]f mere negligent conduct on the part of the prosecutors is asserted, then . . . the delay and/or prejudice suffered by the defendant will have to be greater than that in cases where recklessness or intentional governmental conduct is alleged.

Id. at 782.

The Government also points to language in *United States v. Breitkreutz*, 8 F.3d 688 (9th Cir. 1993) for the contention that negligent behavior is insufficient. *Breitkreutz*, however, does not overrule *Moran*: the defendant in that case was unable to show prejudice, and the court therefore did not have occasion to examine the reasons for the Government's delay.

Appendix D

C. Determination as to Each Respective Count

As noted in both *Doggett* and *Butz*, in a motion to dismiss due to Government delay the trial court is required to weigh the length of the delay, the reasons for the delay, and the prejudice suffered. Only after considering each of these factors, and whether they fall in favor of the Government or the defendants, does the court determine whether excessive delay requires dismissal. As noted *Barker v. Wingo*, the determination of how long is too long cannot be "quantified into a specified number of days or months." 407 U.S. at 523. The weighing of these factors requires a court to make difficult, and often subtle, distinctions.

These distinctions are given general guidance by previous decisions examining government delay, most notably, the eight-year delay in *Doggett*. In *Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990), the court found that a four year delay is "an alarming amount of time," and after considering the Government's "otiose progression" on the case, granted habeas relief. *Id.* (finding due process violation based on delay in deciding petitioner's appeal). The *Coe* court characterized a delay of eight and a half years in a similar case as a "staggering" delay. *Id.*

In the end, the Court must consider the length of the delay, the resulting prejudice to the defendant, and the reasons for the delay, and determine whether forcing the defendant to stand trial on specific counts is fundamentally unfair. *Barker*, at 530.

In this case, many of the acts charged in the indictment date back eight years. The 31 individual counts of the indictment, however, involve differing time periods, and differing degrees of prejudice, both actual and presumptive. Each count must therefore be considered separately. As set forth below, the Court

has determined that some of the charges must be dismissed. While the Court acknowledges that all of the activities alleged in the indictment are related to one another, it finds, for the reasons set forth below, that the Government's delay with respect to Defendants earlier activities does not infect the entire indictment.

1. *Counts 1 and 2*

Counts One, alleging conspiracy to defraud a financial institution, and Count Two, alleging fraud against Far Western Bank, rest almost exclusively upon the participation of Richard Burns, Joyce Burns and David Watt in the RSIA Limited partnership. Although the Partnership profits were continued through 1990, the core of these charges involve the structuring of the Partnership between Joyce Burns, Richard Burns and David Watt in 1986.

The delay in these charges is approximately eight years. Furthermore, the existence and structure of the partnership was documented by the Government in three previous investigative reports. The bank examiner who knew of these arrangements and allegedly gave his tacit approval is deceased. Many of the records regarding the Partnership have been destroyed, and many of the witnesses' memories eroded. For these reasons, the Court finds that the charges based on the participation of the Defendants in the Partnership (Counts One and Two) violate Defendants' due process rights and must be dismissed.

2. *Count 3*

Count Three charges all four defendants with defrauding Imperial. The charges are based on allegations that Fabiano was

negotiating an employment contract with Far Western at the same time he approved an agreement between Imperial Savings and Far Western. The Government alleges that the agreement resulted in $11,000,000 of servicing fees for Far Western to the detriment of Imperial.

The Government alleges that these activities took place between November 10, 1988 and October 1989. The pre-indictment delay therefore amounts to between four and five years. However, unlike the allegations surrounding the Partnership, there are no allegations that the relationship between Fabiano and his eventual co-defendants was investigated and documented prior to late 1989 and early 1990. The post-discovery delay therefore appears to be three years.

The Court does not find that the Government acted negligently with respect to these activities. The delay alone, as noted in *Doggett* at 2693, is not sufficient to support a dismissal. The delay in this count is less than five years, which was the statute of limitations in force at the time the acts occurred. As such, Defendants' motion to dismiss Count Three is denied.

3. *Counts 4–12: Bribery of Rocco Fabiano*

Defendants are charged with a total of nine counts of bribery. With the exception of Count Four, the alleged acts of bribery all occurred in March and April of 1989. The delay in these counts is approximately four and one-half years. Furthermore, like the charges supporting count Three, the evidence indicates that the Government did not discover the alleged acts of bribery until late 1989 and early 1990.

Although the Court notes that even a three year delay in this

case is troubling, it cannot find that the Government acted negligently with respect to these counts. Furthermore, as noted above, these acts fell well within the five-year statute of limitations period previously in force.

Defendants argue that since the motivation for the alleged bribery was linked to the acts in 1986 and 1987, defendants are equally prejudiced in their ability to defend the bribery counts as they are in their ability to defend the substantive bank fraud count. The Court disagrees. The acts of bribery, while linked generally to the Partnership and the earning of insurance commissions, will not depend upon legality of that relationship. As such, Defendants' motion to dismiss counts Four through Twelve is denied.

4. *Counts 13 – 17: Filing False Tax Returns*

Richard Burns, Fabiano, and Watt are all accused of misrepresenting income on their tax returns in 1989 and 1990. The delay in these charges was between three and one-half and four and one-half years. Again, the Court is troubled by the delay with regard to these charges. However, the Court cannot find, under *Doggett* or any other authority, that the delay constitutes Government negligence. As such, the Defendants' motion to dismiss counts 13 - 17 is denied.

5. *Counts 18 – 26: Partnership Money Laundering*

At the hearing on August 29, 1994, the Court questioned the Government as to whether the Far Western money laundering charges would necessarily fall if the underlying Far Western bank fraud charges were dismissed. The Government agreed that the money laundering charges were dependent on the substantive bank fraud charges.

As such, the dismissal of counts One and Two require that the laundering charges based on those activities must also fall. The Court finds that counts 18 through 26, are all derivative of the Partnership, and the earning of the insurance commissions. As such, counts 18 through 28, inclusive, are dismissed.

6. *Counts 27–28: Imperial Money Laundering*

Counts 27 and 28 are not dependent on Counts One and Two. These count depend, instead, on the bribery allegations in counts Four through Twelve. As the bribery counts are not subject to dismissal on grounds of delay, these counts are likewise preserved.

7. *Counts 29 – 30: False Statements*

Count 29 charges Richard Burns with making a false statement in April of 1986 when he stated that he would refrain from participating in the activities of Far Western Bank. The fact that Richard Burns was in fact participating in the affairs of Far Western become known to the bank examiners shortly after Burns made the statement. Furthermore, two of the deceased witnesses who allegedly knew of and tacitly approved of Burns' involvement are deceased.

Count 30 charges David Watt with making a false statement in November of 1987 when he informed bank examiners that he had sold his interest in the Partnership. While this count involves less delay than count 29, and there is limited evidence that the Government knew of Watt's false statement prior to the investigation of the Southern District, the Court finds, nonetheless, that the degree of prejudice Watt has suffered due to the delay requires dismissal of this count.

Appendix D

8. *Count 31: False Statement by Rocco Fabiano*

Count 31 charges Fabiano with filing a false financial statement with the FDIC on March 27, 1989. The delay surrounding this count is three years less than the delay in the similar count against Richard Burns, and one and one-half years less than the false statement against David Watt. Furthermore, there is no allegation that the government had notice of the false statement prior to the beginning of the 1990 investigation. As such, the motion to dismiss count 31 is denied.

IV. Conclusion

In sum, the Court finds that with respect to Counts 1, 2, 18-26, and 29-30, the length of delay and the Government's negligence in bringing the charges requires a dismissal of the indictment. While the exchange of funds in that case extended until as recently as 1990, these ancillary overt acts are not sufficient to protect all of the counts in the indictment from dismissal. The alleged illegality of the counts designated above is dependent upon the fraudulent activities which allegedly occurred in 1986 and 1987. The facts surrounding the transfers of money, while they may assist the government in proving its case, will provide little if any assistance to the Defendants in disproving allegations regarding the earlier activities. As such, the Government cannot relay on these acts as evidence that the delay in this case was not so great.

With respect to remaining charges, however, the Court finds that the length of the delay and the prejudice suffered are not sufficient grounds for dismissal on the basis of pre-indictment delay.

Appendix D

IT IS SO ORDERED:

DATE: 9/6/94

s/ John S. Rhoades
JOHN S. RHOADES, SR.
UNITED STATES DISTRICT JUDGE

Copies to:

All parties